PUBLIC PROSECUTOR v. AHMAD BIN SHAFIE

[S.C. (Salleh Abas L.P., Abdul Hamid C.J. (Malaya), Seah, Hashim Yeop A. Sani & Abdoolcader S.C.JJ.) October 14 & November 5, 1987]

[Kuala Lumpur – Supreme Court Criminal Reference No. 5 of 1987]

Criminal Procedure – Charge – Whether a charge under section 39B of the Dangerous Drugs Act 1952 is defective in law if it is not specified therein the words "on his own behalf or on behalf of any other person" – Possession, custody and control of dangerous drugs exceeding stated amount – Presumption of trafficking – Definition of trafficking – Dangerous Drugs Act 1952, s. 39B.

In this case, the following questions were reserved for determination by the Supreme Court: (1) whether a charge under section 39B of the Dangerous Drugs Act 1952 (Revised 1980) is defective in law if it is not specified therein the words "on his own behalf or on behalf of any other person"; (2) if the answer to question 1 is in the affirmative, whether, having regard to the presumption under section 37(da) of the Act, such defect is curable by section 422 of the Criminal Procedure Code (F.M.S. Cap. 6).

Held: (1) the words "on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia" appearing in section 39B of the Dangerous Drugs Act 1952 are merely to emphasise that an offence is committed by any person who *traffics* in dangerous drugs whether on his own behalf or on behalf of any other person, *whether* the other person is in or outside Malaysia. These words do not constitute an element which is essential to complete the offence and may be omitted from the charge without affecting the legality of the charge;

(2) on the evidence relied by the prosecution in this case, the charge was sufficient and valid. The omission of the words "on his own behalf or on behalf of any other person" cannot be said to vitiate the charge and is not fatal to the charge;

(3) the answer to question 1 is in the negative. Question 2 does not arise.

Cases referred to:

(1) *Rex* v. *Barraclough* [1906] 1 K.B. 204.
(2) *Hashim bin Mat Isa* v. *Public Prosecutor* [1950] M.L.J. 94.
(3) *Ong Ah Chuan* v. *Public Prosecutor* [1981] 1 M.L.J. 64.
(4) *Wong Kee Chin* v. *Public Prosecutor* [1979] 1 M.L.J. 157.

SUPREME COURT.

Tan Sri Abu Talib bin Othman, Attorney-General (*Tan Hock Chuan,* Deputy Public Prosecutor, with him) for the appellant.

Karpal Singh (*Manjit Singh* with him) for the respondent.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the judgment of the court): The two questions reserved for determination under section 66 of the Courts of Judicature Act 1964 are as follows:

(1) Whether a charge under section 39B of the Dangerous Drugs Act 1952 (Revised 1980) is defective in law if it is not specified therein the words "on his own behalf or on behalf of any other person".

(2) If the answer to question 1 is in the affirmative, whether, having regard to the presumption under section 37(da) of the Act, such defect is curable by section 422 of the Criminal Procedure Code (F.M.S. Cap. 6).

For a proper perspective of the questions posed, it would be best that the relevant provisions of the Dangerous Drugs Act 1952 be reproduced.

(1) The word "trafficking" is defined in section 2 of the Act as follows:

> " 'Trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug."

(2) There is a statutory presumption in respect of cannabis in section 37(da) of the Act which reads as follows:

> "37(da) Any person who is found in possession of –
> ...
> (vi) 200 grammes or more in weight of cannabis;
> (vii) 200 grammes or more in weight of cannabis resin;
> (viii) a total of 200 grammes or more in weight of cannabis and cannabis resin;
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug."

(3) Section 39B(1) of the Act creates the offence and, *inter alia,* provides that no person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia, traffic in a dangerous drug.

It is elementary but nevertheless fundamental that the charge against an accused person must carry the ingredients of the offence and which must be proved against him. According to the charge against the respondent here, what had to be proved was that he was in possession, custody and control of the two paper bags containing 2,245 grammes of cannabis on the date and time as specified in the charge. Once that is proved, the presumption under

section 37(da) operates and the offence of trafficking is completed under section 39B of the Act. The words *"on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia"* appearing in section 39B of the Act are merely to emphasise that an offence is committed by any person who *traffics* in dangerous drugs *whether* on his own behalf or on behalf of any other person, *whether* the other person is in or outside Malaysia. In a sense, they are *ex abundanti cautela*. These words do not constitute an element which is essential to complete the offence and may be omitted from the charge without affecting the legality of the charge. On the charge as framed against the respondent in this case, they do not even require proof to complete the offence.

Rex v. *Barraclough*[1] was a case stated for consideration in respect of the omission of certain words from the charge. The accused there was indicted for publishing a libel. One of the objections raised before the judge in the first instance was that the indictment relating to the publication of an alleged defamatory libel was bad for not setting out the words of the alleged libel. That objection was upheld. The other objection to the charge was that since the manifest intention of the framer was to charge for the publication of a defamatory libel and not of an obscene libel, the indictment must fail and could not be construed as a charge of obscene libel. It was argued also that the indictment for the alleged obscene libel was in any case bad by reason of the omission of the words "to the manifest corruption of the morals of his Majesty's subjects". The judge ruled that this objection could not stand, holding that an obscene libel *ex vi terminorum* connotes that it is to the manifest corruption of morals. This ruling was subsequently upheld. It was a criminal offence to publish unlawfully obscene matter and the gist of the offence is the unlawfulness of the publication. If the matter published is obscene, there is an inference of law that its tendency is to corrupt public morals, and there is no necessity to aver it in the indictment. The rationale is that the omission of superfluous words from the charge does not vitiate the charge.

In *Hashim bin Mat Isa* v. *Public Prosecutor*[2], the accused was convicted of murder under section 302 of the Penal Code. On appeal, the conviction was quashed on the grounds of total non-direction by the trial judge on the ingredients of the offence. In the charge, the word "intentionally" was inserted preceding the words "causing the death". Murder is defined in section 300 of the Penal Code as follows:

> "Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or
>
> Secondly. If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or
>
> Thirdly. If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or
>
> Fourthly. If the person committing the act knows that it is so imminently dangerous that it must be in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid."

Willan C.J. said in the Court of Appeal's judgment at p. 95:

> "The presence of the word 'intentionally' suggests that the charge in the present case was copied from the form set out in text-books on the Indian Penal Code. To include the word 'intentionally' in a murder charge is unnecessary, and may cause confusion and embarrassment where the prosecution, at some stage of the trial, find they have to rely for instance on the fourth definition of the offence of murder, which entails proof of knowledge, and not intention."

In *Ong Ah Chuan* v. *Public Prosecutor*[3], the accused was originally charged under the Singapore Misuse of Drugs Act 1973. Section 3 of the Singapore Act creates the offence of trafficking in a controlled drug and the words "on his own behalf or on behalf of any other person, whether or not such other person is in Singapore" also appear in that section. There is also a statutory presumption contained under section 17 of the Singapore Act similar to ours. The charge against Ong Ah Chuan also omitted the words "on his own behalf" but no adverse comments came from the Privy Council on the charge. What is pertinent is that the Privy Council approved the passage in the judgment of the Singapore Court of Criminal Appeal in *Wong Kee Chin* v. *Public Prosecutor*[4] on the operation of the statutory presumption. The passage read:

> "When it is proved that the quantity of diamorphine which the accused person was transporting (in the dictionary sense of the term) was two or more grams, a rebuttable presumption arises under section 15(2) that the accused had the said controlled drug in his possession for the purpose of trafficking. *Proof of the act of transporting plus the presumption under section 15(2) would constitute a prima facie*

case of trafficking which if unrebutted would warrant his conviction. In those circumstances the burden of proof would clearly shift to the accused and he would have to rebut the case made out against him."
(Emphasis provided)

Thus on the evidence relied on by the prosecution in this case, the charge was sufficient and valid. In fact in every case where an accused is charged under section 39B of the Act and the evidence relied on is possession, custody and control of a dangerous drug of an amount which invokes the statutory presumption under section 37(da), the omission of the words "on his own behalf or on behalf of any other person" cannot be said to vitiate the charge and is not fatal to the charge.

Therefore our answer to Question 1 is in the negative. Question 2 does not arise.

Solicitors: *Manjit Singh & Co.*

MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD. v. DHANOA SDN. BHD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C.JJ.) July 17 & September 26, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 9 of 1987]

Land Law – Charge – Chargor in default – Application for sale of charged lands – Interest allowed to be claimed – Whether O.42 r.12, R.H.C. 1980 applicable – Procedure for recall of loan – Validity of order of sale – National Land Code 1965, ss. 254, 255 & 257.

Civil Procedure – Interest rate payable under order made pursuant to s. 257 of National Land Code – Whether O.42 r.12, R.H.C. 1980 applies – No judgment debt – R.H.C. 1980, O.20 r.11 & O.42 r.12.

The appellant had applied for the sale of certain lands belonging to the respondent to satisfy the sum of $2,219,682.70 due to them. The learned trial judge made an order for the sale of the charged lands by public auction under section 257 of the National Land Code to satisfy the sum due, with interest thereon at the rate of 8% per annum from November 29, 1986 to the date of realisation. The appellant appealed against that part of the order directing that interest at 8% be paid by the respondent to the appellant. The respondent cross-appealed against the order of sale made by the High Court.

Held: (1) since there was no judgment debt in this case, the learned judge was wrong to apply Order 42 rule 12 of the Rules of the High Court 1980;

(2) Order 42 rule 12 Rules of the High Court 1980 has no application to any court order made pursuant to section 257 of the National Land Code. That part of the order dealing with interest should therefore be deleted and substituted with an order to pay interest at the rate agreed between the parties from November 29, 1986 to the date of the public auction sale;

(3) in this case, when the notice of demand was given, the appellant acted under the provisions of the registered charge and not under section 255 of the National Land Code. The statutory notice was issued under section 254 and not pursuant to section 255 of the Code and the provision of section 255 which prescribes a minimum period of one month to be provided for the repayment of the principal sum secured by a registered charge was not applicable;

(4) the omission in the order for sale of the charged lands for the Registrar of the High Court to fix a reserve price for the sale as required by section 257(1)(d) of the National Land Code did not vitiate the court order but may be remedied by a subsequent application to the court;

(5) although section 257(2) of the National Land Code confers a discretionary power on the High Court to regulate the sale by public auction when more than one parcel of land is involved and enables the court to give directions whether the charged lands be sold individually or in lots, such directions need not be considered at the time when the application to sell the charged lands is heard but may be dealt with at a later date before the date of the public auction;

(6) the cross-appeal against the order for sale made by the High Court is therefore dismissed.

Cases referred to:

(1) *Supreme Finance (M) Bhd.* v. *Koo Sin Ken* [1987] 1 M.L.J. 296.

(2) *American International Assurance Co. Ltd.* v. *Union Builders (Malaysia) Sdn. Bhd.* [1973] 1 M.L.J. 95.

SUPREME COURT.

H. Y. Too for the appellant.

A. Kanesalingam for the respondent.

Cur. Adv. Vult.

Seah S.C.J. (delivering the judgment of the court): On the application of the chargee/appellant (hereinafter called the appellant), the learned judge ordered that the charged lands belonging to the chargor/respondent (hereinafter called the respondent) be sold by public auction under section 257(1)(a) of the National Land Code 1965 to satisfy the sum of $2,219,682.70 due to the appellant as at November 28, 1986 with interest thereon at the rate of 8% per annum from November 29, 1986 to the date of realisation.

This is an appeal by the appellant against that part of the court order directing that interest at 8% per annum be paid by the respondent to the appellant. There is a cross-appeal by the respond-